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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 947

GERALD A. SCHROEDER and CLARA JOHNSON SCHROEDER,

Petitioners,

vs.

J. C. BUSENHART, et al.,

Respondents.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District.

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Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District.

To: *The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:*

Your petitioners, Gerald A. Schroeder and Clara Johnson Schroeder, respectfully pray that a writ of certiorari be issued from this Court to review the judgment of the Appellate Court of Illinois, First District (from which a Petition for Leave to Appeal was denied by the Supreme Court of Illinois), entered in this cause.

OPINION BELOW.

No formal opinion was entered by the Circuit Court of Cook County.

The Opinion of the Appellate Court of Illinois, First District, is reported at 80 Ill. App. 2d 43, 225 N.E. 2d 702 (1967), and is attached hereto as Appendix A, pp. 1a-10a.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the judgment sought to be reviewed is March 10, 1967, Appellate Court, First District (Petition for Leave to Appeal was denied by the Supreme Court of Illinois on September 26, 1967).

2. A timely petition for rehearing was filed in the Appellate Court. The Appellate Court denied the petition for rehearing on April 14, 1967. Illinois procedure makes no provision for rehearing of the denial of a petition for leave to appeal.

3. The jurisdiction of this Court is invoked under 28 U.S.C.S. Section 1257 (3).

The Opinion of the Appellate Court of Illinois, First District, is reported at 80 Ill. App. 2d 43, 225 N.E. 2d 702 (1967), and is attached hereto as Appendix A, pp. 1a-10a.

The Supreme Court of Illinois denied the Petition for Leave to Appeal without opinion.

QUESTION PRESENTED FOR REVIEW.

Did a decision of the Appellate Court of Illinois affirming an order of the trial court dismissing an action for conspiracy on the ground that it was barred by a prior judgment in condemnation and assessing attorneys' fees and costs against petitioners for making false statements in their pleadings violate the principles of due process of law secured by the 14th Amendment to the United States Constitution when no hearing was had by the Illinois Courts on the conspiracy or the alleged falsity and the parties and issues in the condemnation and conspiracy actions were not the same?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Involved here are the Fourteenth Amendment to the United States Constitution, (Appendix B, p. 11a); Art. II, Sections 2 and 13, Constitution of the State of Illinois, (Appendix C, p. 11a); and Chapter 110, *Illinois Revised Statutes*, (1965), Section 41, (Appendix D, p. 12a).

STATEMENT OF FACTS.

On or about December 11, 1963, Gerald A. Schroeder and his wife, Clara J. Schroeder, petitioners here, filed a conspiracy complaint for $1,000,000.00 in the Circuit Court of Cook County, Illinois, against some fifty individuals, respondents here, alleging the defendants had combined together to drive the petitioners out of business. The combination was alleged to have extended for a two year period prior to the filing of the complaint. The defendants were charged with having converted petitioners' property, having caused their removal from their real estate, and having assaulted and imprisoned the petitioners to effectuate the conspirators' ends.

Trustees of Schools of Township 42, a municipal corporation, sought leave to intervene, claiming it was the owner of the land on which the torts were alleged to have occurred and any decision by the Court might affect its title to the property. It prayed the court enter a judgment in its behalf against the petitioners in the amount of $28,231.63 for fees and expenses of litigation with petitioners in the instant litigation and litigation in the federal and state courts which it claimed was vexatious.

The School Trustees alleged that in 1959, it had filed a condemnation petition seeking fee simple title to the 18 acres of realty occupied by the petitioners on Rand Road, in Mt. Prospect, Illinois. The petitioners had filed a traverse denying the school district sought to take the land for public purposes and denying it had authority, under the Illinois statutes to acquire a fee interest in real estate.

This traverse was denied and the question of value then presented to a jury which returned a verdict of $267,083.33. After petitioners refused to agree to a remittitur, a new trial was ordered by the court. On appeal by petitioners, the Supreme Court of Illinois reversed the order for new trial, *Trustees of Schools* v. *Schroeder*, 23 Ill. 2d 74, 177 N.E. 2d 178 (1961), but refused to pass on the merits of the traverse since the appeal was from an order granting a new trial.

On remand, in October, 1961, the Circuit Court entered a judgment awarding fee simple title to the petitioner. A few days later, it entered an order directed to the Sheriff commanding him to put the School Trustees into possession. The Schroeders appealed both these orders to the Supreme Court of Illinois in November, 1961. In December, 1961, prior to a decision by the Supreme Court, petitioners were ousted from the realty and their business destroyed.

On appeal from the decree of October, 1961, the Supreme Court of Illinois decided adversely to petitioners the only issue raised by their then counsel, Messrs. Wahler and Pecyna, namely that a school district could not take land by eminent domain within 40 rods of the owners' dwelling. *Trustees of Schools* v. *Schroeder*, 25 Ill. 2d 289, 184 N.E. 2d 872. (1962).

Petitioners than retained new counsel, Alfred M. Loesser and Stephen Lee of the Illinois bar, who immediately sought to file an amended petition for rehearing with the Illinois Supreme Court reasserting the issues raised on the traverse and asserting that the taking of petitioners' property by virtue of the judgment of the Circuit Court of Cook County in eminent domain deprived the petitioners

of the rights secured to them by the Constitution of the United States. Leave to file this amended petition was denied and the petition for rehearing was denied on September 27, 1962, without opinion.

After the denial of their petition for rehearing, petitioners sought leave in the Circuit Court of Cook County to vacate the condemnation judgment and to stay the proceedings in condemnation, asserting that the school district was not taking the land for public purposes and the court had no power to award more than an easement for school purposes to so much of the land as might be necessary for those purposes. They sought to present evidence in support of that petition, but the court refused to hear evidence and denied the petition.

The School District sought a supplemental writ of possession during the pendency of the petition for rehearing which was issued by the court after the petition for rehearing was denied and the Circuit Court denied the petition to vacate its judgment. Petitioners appealed from these orders.

Meanwhile, petitioners and others sought leave to file a taxpayers' suit for an injunction restraining the school district from taking petitioners' land, charging on a number of grounds that the school district was proceeding in violation of the law. The Circuit Court denied leave to file that suit and an appeal was taken from that order. This appeal was combined with an appeal taken by petitioners from the orders refusing to vacate the condemnation order and issuing the supplemental writ. In *People ex rel. White* v. *Busenhardt, et al.*, 29 Ill. 2d 156, 193 N.E. 2d 850 (1963), the Circuit Court was affirmed. The

Illinois Supreme Court said, 29 Ill. 2d 156, 159, 193 N.E. 2d 840, 853 (1963):

> "In the eminent domain feature of this appeal, the Schroeders seek to raise the following issues:
>
> "(1) That the court had no jurisdiction to enter judgment for the taking of a fee-simple title;
>
> "(2) That the property is exempt from condemnation because of its location.
>
> "(3) That the ordinance (resolution) authorizing condemnation was void for lack of a quorum. * * *
>
> "(4) That there was abandonment of the project by failure to pay the award within 150 days * * * as directed; and,
>
> "(5) That the appeal bond was void."
>
> "All of these points could have been raised in the second appeal, in fact (2) above was conclusively litigated against the Schroeders, and they are now barred."

No petition for certiorari to the Supreme Court of the United States was filed seeking review of the decisions by the Supreme Court of Illinois. Instead, a complaint was filed in the Federal District Court for the Northern District of Illinois challenging the validity of the Illinois judgment and alleging violations of the petitioners' civil rights. This was dismissed by the District Court for want of jurisdiction; the dismissal was affirmed by the Seventh Circuit Court of Appeals, *Schroeder* v. *Illinois,* 354 F. 2d 561, (1966) and petition for certiorari was denied by the Supreme Court of the United States on June 6, 1966. *Schroeder* v. *Illinois,* 86 Sup. Ct. Reporter 1862, 3844 S 972.

The School Trustees pointed out the history of this litigation in its then posture and asked for the entry

of an injunction restraining petitioners from instituting or further prosecuting any litigation affecting the title to this land as well as a judgment for attorneys' fees.

Answers were filed to the plaintiffs' complaint by seven defendants. The school defendants filed no answers but joined with a number of the other defendants in a motion for summary judgment alleging that the court had judicial knowledge that the eviction of the petitioners was by action of the Sheriff pursuant to writ issued in the condemnation cause and that as a matter of law the court judicially knew the charges in the complaint that the defendants conspired to harm plaintiffs and their property could not be true.

A motion was filed by the school defendants and others under Rule 41 of the Illinois Practice Act. This charged that the allegations of petitioners' complaint asserting that the defendants conspired to destroy petitioners and evicted them pursuant to the conspiracy were untrue and were made solely to harass the Board of Education in their use of the real estate; that the complaint was only another of a series of maneuvers to vex the School Board; and that an action had been filed in the Federal Court since the filing of the conspiracy suit by the petitioners in an unlawful attempt to procure Federal Court review of legal proceedings of Illinois courts of competent jurisdiction. It asked that the court tax petitioners for reasonable expenses sustained by respondents in the defense of the conspiracy suit together with reasonable attorneys' fees.

On June 2, 1964, the Circuit Court granted the motion of the defendants for summary judgment. It denied the motion to tax reasonable expenses and attorneys fees.

The instant appeal by the petitioners from the order granting summary judgment followed. Respondents cross-appealed from the order denying their motion to tax costs and fees.

The petition for leave to intervene was denied but no appeal was taken from that order.

While the appeal for fees was pending, a suit for fees was instituted by the Trustees of Schools against petitioners in the Circuit Court of Cook County. The prayer for relief asked for fees for all expenses of litigation to date including fees and expenses in *Busenhardt*, and asked that the prosecution of both the appeal in *Busenhardt* and the action pending in the Federal Court be restrained.

The federal questions sought to be reviewed were first raised in the Petition for Rehearing filed in the Appellate Court of Illinois as points for reconsideration of its decision by this court. They were denied by that court's refusal to rehear the case. No opinion on the federal questions was issued by either the Appellate or Supreme Court. Because of the length of the argument, the petition for rehearing is attached hereto as Appendix E.

In the fall of 1962, the school district built a small intermediate grade school on ¼ acre of the 18 acre tract taken from the petitioners. The school building is located the maximum distance from the Rand Road frontage which is not being used for a school or school purposes.

REASONS RELIED ON FOR ALLOWANCE OF A WRIT OF CERTIORARI.

In this case a state court has decided a federal question in a way which is in conflict with the applicable decision of this Court and the Constitution of the United States and has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT.

Fundamental to American jurisprudence is the right of a citizen not to be deprived of his property without due process of law. By this is meant a right to have a cause heard in a courtroom on evidence; and to have a decision made based on that evidence.

Without a hearing on the facts as to conspiracy, the Illinois Courts have decided that because a condemnation judgment was entered in a prior proceeding against petitioners, the petitioners are precluded from bringing conspiracy charges against persons not parties to the prior proceeding although the conspiracy charges were not and could not have been heard in the prior proceeding.

Similarly, the Appellate Court of Illinois, without hearing evidence, although the trial court refused to do so, found the allegations of petitioners' complaint alleging petitioners were the owners of the Rand Road real estate, to be false and vexatious and assessed fees and costs against petitioners for making the statements and referred the cause back to the trial court for the assessment of damages.

By their arbitrary actions in finding against the petitioners without a hearing, the Courts of Illinois have deprived the petitioners of the due process of law secured to them by the Fourteenth Amendment to the Constitution of the United States and Article II, Section 2, Constitution of Illinois, and certiorari is required to correct the action of these courts.

While two points are involved in this action; dismissal of the conspiracy charge and assessment of fees, both turn upon the same issue, the right to be heard.

Res Judicata.

The elements of *res judicata* in Illinois are set out in *Freeman on Judgments,* Sec. 252. To render a previous judgment a bar on an action, the prior judgment (1) must proceed from a court having jurisdiction, (2) be between the same parties; and (3) be for the same purpose. If it is not possible to raise the issues raised in the latter suit in the earlier suit, the previous judgment is not a bar. See *Oliver* v. *Oliver,* 313 Ill. 612, 145 N.E. 123 (1924), and *Deke* v. *Huenkemeier,* 289 Ill. 148, 152 (1919) 124 N.E. 381. Jurisdiction over the subject matter and parties, alone, is not sufficient to render a decree *res judicata, Hansberry* v. *Lee,* 311 U.S. 32 (1940). If the parties and causes of action differ, no bar arises. *Hooper* v. *U. S.,* 326 F. 2d 948.

In the instant case neither the same parties nor the same purposes were involved in the two law suits; the first being an action by a municipal corporation, Trustees of Schools of Township 42, against the petitioners in condemnation, and the second suit, an action by petitioners against some fifty specified individuals alleged to have participated in one or more torts committed against the petitioners. The first suit was a proceeding against land; the second, an action for conspiracy to destroy the petitioners' business.

It was impossible to raise the issues sued for in the latter suit in the earlier action because the Illinois courts do not permit examining the motives of officials in a condemnation action. *Deerfield Park District* v. *Progress De-*

velopment Corporation, 22 Ill. 2d 131 (1961); 174 N.E. 2d 850. Moreover, an eminent domain proceeding is not governed by the Illinois Practice Act.

Chapter 110, Ill. Revised Statutes, (1965) *Practice,* Sec. 1, provides:

> "The provisions of this Act apply to all civil proceedings * * * except * * * eminent domain. In all these proceedings the separate statutes control to the extent to which they regulate procedure (but this Act applies as to matters of procedure not so regulated by separate statutes)."

Chapter 47, Illinois Revised Statutes (1965), Eminent Domain, provides only for the determination of necessity of taking land and the valuation of the same; it makes no provision for hearing of consequential torts and a landowner is remitted to his action at law for the determination of miscellaneous damage to his property. *Horn* v. *City of Chicago,* 402 Ill. 549, 87 N.E. 2d 642 (1949).

Under these circumstances to apply the doctrine of *res judicata* to bar a hearing on the conspiracy action is a violation of due process of law. *Hansberry* v. *Lee,* 311 U.S. 32 (1940). Moreover, while a merely erroneous application of the doctrine of *res judicata* will not confer jurisdiction on the Supreme Court of the United States, the use of the doctrine of *res judicata* to destroy all remedies, as here has been done, is a denial of due process of law requiring correction by this Court. See *Brinkerhoff-Faris Trust and Savings Company* v. *Hill,* 50 S. Ct. 451 (1930) at 454, where the Court said:

> "It is true that the Courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that the Court's power to review decisions of state courts is limited to their decisions on federal questions and that the

mere fact that a state court has rendered an erroneous decision on a question of state law or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.

"But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiffs on the merits, although it may be observed that the plaintiff's claim is one arising under the federal constitution and consequently, one on which the opinion of the state court is not final; nor with the accuracy of the statute. * * * Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it had an opportunity to present its case and be heard in its support. Undoubtedly the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the *Laclede* case. Neither of these matters raises a federal question; neither is subject to our review. But while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy unless there is or was afforded to him some real opportunity to protect it."

In *Young* v. *Ragen,* 337 U.S. 235 (1949), 69 S. Ct. 1073, 1074, the Court said:

"Of course we do not review decisions which rest upon adequate nonfederal grounds, and of course Illinois may choose the procedure it deems appropriate for the vindication of federal rights. *Loftus* v.

> *People of the State of Illinois*. But it is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of federal right."

Moreover, where, as here, the judgments punish a petitioner for failing to follow a remedy never available to him, denial of due process is accomplished. *Brinkerhoff-Faris Trust and Savings Company* v. *Hill,* 50 S. Ct. 451 (1930). The Appellate Court of Illinois commented, *Schroeder* v. *Busenhardt,* 80 Ill. App. 2d 431, (1967), 225 N.E. 2d 702 at 705:

> "The condemnation forum was the only forum in which to determine the issue of whether the taking was for a bona fide public purpose."

Because, said the Appellate Court, petitioners had not raised the issue of motive in the condemnation Court, the petitioners were barred from raising it in the conspiracy suit. But had petitioners attempted to raise the conspiracy issue in the condemnation proceeding, they would not have been heard! *Deerfield Park District* v. *Progress Development Corporation,* 22 Ill. 2d 131 (1961) 174 N.E. 2d 850. As said in *Brinkerhoff-Faris Trust and Savings Company* v. *Hill,* 50 S. Ct. 451, (1929), at 435:

> "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without it ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiffs' complaint and denied it relief not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property."

FALSITY OF STATEMENTS REGARDING OWNERSHIP.

Through the long years of litigation between the Schroeders and the School Trustees, there has never been an adjudication of the merits of the question of the jurisdiction of a Court to vest a fee simple title to realty in a school board. The law of Illinois is clear that a school district has no power to take fee simple title by eminent domain. See *Kelly, et al.* v. *Bowman, et al.,* 104 F. Supp. 973 (Eastern District Ill. 1952); affirmed 202 F. 2d 275, 276, (C.A. 7th 1953). In that case, the Court of Appeals adopted the district court opinion and stated:

> "Judge Casper Platt, by whom the case was tried, filed an opinion, *Kelly* v. *Bowman,* D.C. 104 F. Supp. 973, which contains an adequate statement of the facts, as well as a thorough analysis of the applicable Illinois law. Inasmuch as we agree with the result which he reached as well as the reasoning upon which it is predicated, we think no good purpose could be served in writing an opinion. We therefore adopt the opinion of Judge Platt as that of this Court."

The Appellate Court of Illinois in *Schroeder* v. *Busenhardt,* 80 Ill. App. 2d 431 (1967) 225 N.E. 2d 702 at 706, flatly states:

> "Defendants contend that it was error for the trial Court to deny their motion to tax against plaintiffs certain expenses and attorneys fees made necessary because of the allegations in the complaint (1) that defendants were members of a conspiracy to ruin the plaintiffs' business; (2) that the plaintiffs owned the condemned property after May 25, 1962, and (3) that the black surface soil on the property was converted by defendants. * * *"

"On the date of filing this complaint none of the above allegations could have been upheld because the Supreme Court had already determined that the school authorities, not the Schroeders, were the owners of the condemned property at the time in question. *Trustees of Schools* v. *Schroeder,* 25 Ill. 2d 289, 184 N.E. 2d 872. * * * While an unfounded claim of ownership might ordinarily not be the kind of statement covered by Section 41, it certainly becomes so after repeated judicial determination adverse to the claimant. And there is authority for the proposition that where as here, a suit is dismissed on the ground of *res judicata,* the sanctions of Section 41 will be imposed."

Res judicata is not a doctrine of substantive law. In *Hooper* v. *U. S.,* 326 F. 2d 982 at 985, it was said:

"We are taught by the Supreme Court that before the doctrine of *res judicata* is applicable as a bar to a second suit, not only must the parties be the same but also the second suit must be upon the same cause of action or demand of the original."

"We are also mindful of the fact that the application of *res judicata* and collateral estoppel is not required by constitutional law doctrine, but each is judicially developed restriction invoked in the name of public policy, requiring that a litigant be given only one day in Court. (*Commissioner of Internal Revenue* v. *Sunner, etc.*). It appears that where the public policy requiring the application of *res judicata* and collateral estoppel is outweighed by overriding considerations like Federal preemption or sovereign immunity, the Court has not adhered to the finality that would otherwise be given to the prior decree. We believe that an example of such an overriding consideration is present here, since a party should be given his day in a Court from which review by the Supreme Court might ultimately be afforded."

As under Point 1, to make a judgment *res judicata,* it must proceed from a Court having jurisdiction, between the same parties and be for the same purpose. We have never had an adjudication here that the condemnation Courts had jurisdiction; what we have had is the Courts of Illinois saying the fee question was *res judicata* because of failure to raise it. A former adjudication in condemnation is not an estoppel where the attempted proceedings were void. *McNutt* v. *City of Los Angeles,* 187 Cal. 249 (1921) 201, 592, *Montague County* v. *White,* Civil Appeals, Texas, 241 S.W. 740 (1922). A void judgment may be attacked at any time in any place, *Chapman* v. *American Surety Company,* 261 Ill. 594 (1941), notwithstanding the doctrine of *res judicata,* and if in fact, the Court was without jurisdiction to vest title to the realty in the School Board, plaintiffs are in truth and fact the owners of the real estate in question. Moreover, under the doctrine set forth in *Hooper, res judicata* is immaterial; a hearing on the merits is required to afford a review by the Supreme Court. If the failure to raise the defense does make it *res judicata,* under the doctrine in *Hooper* a hearing is still required to determine who owned the realty and whether the parties had conspired together and the refusal of the Illinois Courts to grant one is a deprivation of the rights to due process of law secured to petitioners by the 14th Amendment to the Constitution of the State of Illinois and Article II, Sections 2 and 13, Constitution of the State of Illinois.

CONCLUSION.

For all of the foregoing reasons we respectfully urge this Court to issue its writ of certiorari to review the decisions of the Appellate Court of Illinois, First District, in this matter. In this period of wide-spread abuse of personal rights, it is imperative that it be made clear that the law of the United States does not permit conviction without a hearing.

Respectfully submitted,

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APPENDIX A.

Opinion of the Appellate Court of Illinois (No. 49983 — March 10, 1967)

Mr. Presiding Justice English Delivered The Opinion Of The Court.

This appeal is from a summary judgment in favor of some fifty defendants alleged in the complaint to have participated in an unlawful conspiracy to deprive plaintiffs of their fruit and vegetable business which had been conducted on plaintiffs' land before it was taken for school purposes through condemnation proceedings. The complaint also alleged separate wrongful acts by individual defendants, and, as to these allegations, the complaint was dismissed without prejudice to plaintiffs' right to institute separate suits against the individual defendants. Defendants have filed a cross appeal from that portion of the order which denied their motion to tax against plaintiffs certain of defendants' expenses and attorney's fees.

On November 6, 1959, proceedings were brought by Township School Trustees to have the land of the Schroeders (plaintiffs in the instant case) condemned for the use and benefit of School District No. 57, Cook County, Illinois. The Schroeders filed a traverse, which, as amended, denied that the School District intended to take the property for public purposes. After the traverse was overruled, the case was tried before a jury which returned a verdict awarding the Schroeders $267,083.33. A motion for a new trial by the School Trustees was granted. On

appeal by the Schroeders, the Supreme Court reversed and remanded with directions to enter judgment on the verdict, but refused to review the ruling on the traverse. *Trustees of Schools* v. *Schroeder,* 23 Ill. 2d 74. Pursuant to this mandate the Circuit Court set aside its order granting a new trial, and entered judgment for the amount of the verdict and costs. On October 23, 1961, an order was entered finding that the judgment award had been satisfied by payment to the County Treasurer for the benefit of the Schroeders, and that the School Trustees had thereupon become vested with the fees simple title to the land and the right to enter thereon and take possession. Pursuant to another order of the Circuit Court directed to the Sheriff, the Schroeders and most of their personal property were removed from the condemned premises and the School Trustees were put in possession of the property on December 13, 1961. The Schroeders appealed from the order vesting title to the property in the School Trustees on the ground that the particular school district involved could not take land by eminent domain within 40 rods of the owners' dwelling. This appeal was also decided adversely to the Schroeders. *Trustees of Schools* v. *Schroeder,* 25 Ill. 2d 289.

Immediately following the decision in this second appeal, the Schroeders obtained new counsel, who filed motions in the Supreme Court for leave to file their additional appearances on behalf of the Schroeders, for leave to file an additional petition for rehearing, and for an order restraining any construction on the property. These motions were all denied by the Supreme Court on September 12, 1962.

Meanwhile, the Schroeders themselves were not idle. They allegedly re-entered the premises and took possession of the condemned property during the 1962 Labor Day week end. The School Trustees, on September 4, 1962, filed a petition for a supplemental writ of possession to remove the Schroeders and to restrain them from further interfering with the rightful possession of the School Trustees. The answer of the Schroeders to this petition denied that the Schroeders had retaken possession of the property, and further charged:

> 4. These Respondents further say that there is great and intense feeling against the graft, corruption and debauchery as shown by the attempted taking of this large tract of land for just an elementary school, the large contractors [sic] entered into and the eagerness and avidity with which the consummation of contracts is sought, the People of Mt. Prospect are up in arms against this project and are going to great lengths because they do not wish to see their tax monies dissipated with the result that things are done and Respondents blamed therefor.

The above charge was stricken as scurrilous by the Circuit Court on its own motion. An Assistant State's Attorney investigating the charge interviewed the Schroeders and Alfred Loeser, one of their new attorneys, and reported to the court that the Schroeders had no foundation for the charge.

The Schroeders' new counsel also filed several other documents in the Circuit Court. On August 16, 1962, they filed a paper charging that the School Trustees had abandoned their petition to condemn because the compensation required to be paid by the original judgment order

entered October 27, 1960 was not paid within 150 days of the entry of that order. In addition, a motion was filed charging that there were several defects in the condemnation proceedings and seeking to restrain the School Trustees from dealing with the condemned property. On September 25, 1962 the Schroeders filed another petition in the Circuit Court in which they charged that the court had no authority to enter an order evicting them from the property and no authority to vest title in the School Trustees.

On October 4, 1962 the Circuit Court granted the order prayed for in the September 4, 1962 petition of the School Trustees, and denied the various motions and petitions of the Schroeders. The Schroeders thereupon filed notice of appeal and on November 2, 1962 again requested the Circuit Court to restrain the School Trustees from dealing with the condemned land until after the decision of the new appeal to the Supreme Court. This petition was denied by the Circuit Court.

In a wholly separate action commenced prior to the denial of the petition for rehearing on the second appeal, the new counsel for the Schroeders, on their behalf and on behalf of various other alleged taxpayers in the School District, filed a petition in the Circuit Court (under Ill. Rev. Stat., (1961) ch. 102, §§ 11-16) for leave to file a taxpayers' complaint to enjoin the Board of Education from expending public funds for construction of a school on the condemned property. Leave to file this taxpayers' complaint was denied by the Circuit Court, and the Schroeders again appealed.

(Appellate Court Opinion)

The Supreme Court, over objection of the Schroeders, consolidated these two last-mentioned appeals and again ruled against the Schroeders' contentions. Matters raised in regard to the condemnation suit were held to have been conclusively adjudicated in an earlier appeal, while some of the matters raised in the taxpayers' complaint were held to have been improperly pleaded because they constituted a collateral attack on a final judgment. Other matters raised in the taxpayers' complaint were said to be conclusions of the pleader or of too indefinite a nature to constitute reasonable grounds upon which to predicate a taxpayers' suit. Both rulings of the Circuit Court were therefore affirmed in an opinion filed September 27, 1963. *People* v. *Busenhart*, 29 Ill. 2d 156.

The Schroeders next instituted suit in the United States District Court on January 20, 1964 against the School Trustees and the Board of Education, among others, in which they sought to have the various proceedings, judgments and orders of the Illinois courts declared null and void. The complaint was dismissed with prejudice for want of jurisdiction, and the Court of Appeals affirmed on the ground that the suit was nothing more than an improper collateral attack on a valid judgment. *Schroeder* v. *Illinois*, 354 F. 2d 561 (7th Cir., 1965). Petition of the Schroeders for certiorari was denied (384 U.S. 972).

Shortly before the Federal Court action was filed, the instant suit was commenced on December 11, 1963, generally charging a conspiracy and, in addition, charging numerous wrongful acts against various individual defendants. The conspiracy count charges that some fifty defendants, including certain School Trustees and Sher-

iff's deputies, on or about December 12, 1962, "* * * conspired together and formed deliberate design and purpose to ruin, oppress and impoverish these Plaintiffs and to destroy and damage their business also." The complaint states that plaintiffs were the owners of the property in question on December 12, 1961, at which time the defendants caused the removal of plaintiffs and the destruction and removal of various pieces of plaintiffs' personal property from the premises pursuant to the conspiracy.

Plaintiffs' conspiracy theory is apparently based on the ground that the removal of their personal property from the condemned premises had never been litigated. But the question of ownership of the condemned property had been conclusively litigated, with the consequence that the conspiracy charge in plaintiffs' complaint is barred under the doctrine of res judicata.

The Illinois Supreme Court had finally adjudicated that the condemnation proceedings had been initiated for a valid public purpose and that fee simple title to the property resided in the School Trustees as of October 23, 1961. That was the date on which the Circuit Court issued an order directing the Sheriff to remove the Schroeders and their personal property from the condemned premises. This order was carried out at about the time plaintiffs allege that the conspiracy and various individual torts were committed by defendants. Plaintiffs are no longer in a position to argue that the school authorities were not put in possession of the condemned premises pursuant to a valid public purpose. That fact had already been established, and the condemnation proceeding was the

only forum in which to determine the issue of whether the taking was for a bona fide public purpose. *Deerfield Park District* v. *Progress Development Corporation, et al.*, 22 Ill. 2d 132.

The time for the Schroeders to have advanced the accusation of a conspiracy to destroy their business was also in the condemnation proceeding, and such an allegation at this juncture again constitutes an improper collateral attack. *Duffy* v. *Frankenberg*, 144 Ill. App. 103. In *Duffy*, plaintiff instituted an action charging that she was forced to pay money as a result of a default judgment allegedly obtained pursuant to a conspiracy. The court held that plaintiff's conspiracy action was barred while the judgment remained in effect, since the judgment had been entered by a court having full jurisdiction of the parties and the subject matter, and was therefore not subject to collateral attack.

All that plaintiffs' conspiracy count alleges to have been done by defendants was done at the direction of the Circuit Court. Consequently, the court judicially knows that defendants' taking possession of plaintiffs' property could not have been pursuant to conspiracy, since it knows that the action had been taken pursuant to the adjudicated right of the school authorities to possession for a valid public purpose. As previously stated, the affirmance of the trial court's order by the Supreme Court conclusively makes applicable the doctrine of res judicata. Entry of summary judgment in this circumstance was therefore correct. *Harwood* v. *Harwood*, 412 Ill. 131, 134-136; *McKinney* v. *City of East St. Louis*, 39 Ill. App. 2d 137, 139.

(Appellate Court Opinion)

Similarly, that part of the complaint that charges individual acts of wrongdoing by various defendants does no more than outline conduct carried on to effectuate the Circuit Court's order that the school authorities be put in possession of the condemned premises. While plaintiffs may claim that certain defendants exceeded the bounds of the court order by their conduct, the individual charges of wrongful acts are insufficient because they are stated indefinitely and are largely in the nature of conclusions of the pleader. *Richardson* v. *Eichhorn,* 18 Ill. App. 2d 273; Ill. Rev. Stat. (1963), ch. 110, § 33(1). Moreover, because the conspiracy count fails on the ground of res judicata, the individual torts pleaded against various defendants are without adequate relation to each other for the purpose of being joined in a single action. *Opal* v. *Material Service Corp.,* 9 Ill. App. 2d 433, 442-444. While the court could have granted plaintiffs leave to file an amended complaint in which to plead each individual tort in a separate count, the record does now show that plaintiffs requested permission to amend their complaint. In this circumstance we conclude that the court properly dismissed without prejudice the several individual tort claims.

Defendants contend that it was error for the trial court to deny their motion to tax against plaintiffs certain expenses and attorney's fees made necessary because of the allegations in the complaint, (1) that defendants were members of a conspiracy to ruin the plaintiffs' business; (2) that the plaintiffs owned the condemned property after May 25, 1962, and (3) that the black surface soil on the property was converted by defendants. We must

therefore decide whether any of these charges (all of which were, in effect, found by the trial court to have been untrue) justify the imposition of the sanctions authorized by Section 41 of the Civil Practice Act. Ill. Rev. Stat., (1963), ch. 110, § 41. That section provides:

> Untrue statements. Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial.

On the date of filing the complaint none of the above allegations could have been upheld, because the Supreme Court had already determined that the school authorities, not the Schroeders, were the owners of the condemned property at the time in question. *Trustees of Schools* v. *Schroeder,* 25 Ill. 2d 289. The history of this apparently unending litigation, as set forth in the record before us, contains abundant evidence that plaintiffs knew, or could reasonably be expected to have known, that they were foreclosed from relitigating the question of ownership of the condemned property and matters collateral thereto. While an unfounded claim of ownership might ordinarily not be the kind of statement covered by Section 41, it certainly becomes so after repeated judicial determination by the Supreme Court adverse to the claimant. And there is authority for the proposition that where, as here, a suit is dismissed on the ground of res judicata, the sanctions of Section 41 will be imposed. *Elston-Damen Currency Exchange, Inc.* v. *Sheon,* 46 Ill. App. 2d 218. We think that the record in this case affords ample justifica-

tion for a finding that the above allegations of plaintiffs' complaint were untrue, were made without reasonable cause, and were made in bad faith. Consequently, that part of the trial court's order denying defendants' motion under Section 41 to tax plaintiffs with pertinent expenses and reasonable attorney's fees is reversed, and the cause is remanded for a hearing to ascertain the amount thereof, and to tax the same accordingly.

Affirmed In Part, Reversed In Part,
And Remanded With Directions.

DRUCKER and MCCORMICK, JJ., concur.

APPENDIX B.

Constitutional Provisions Involved

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall invoke or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX C.

The Constitution of the State of Illinois, Article II, Section 2, provides as follows:

> "No person shall be deprived of life, liberty or property, without due process of law."

Article II, Section 13, Illinois Constitution is as follows:

> "Private property shall not be taken or damaged for public use without just compensation. Such compensation, where not made by the state, shall be ascertained by a jury, as shall be prescribed by law."

APPENDIX D.

Statutes Involved

Chapter 110, Illinois Revised Statutes, (1965) Practice, Sec. 41, provides:

> "Allegations and denials made without reasonable cause and not in good faith and found to be untrue shall subject the party pleading them to the payment of reasonable expenses actually incurred by the other party by reason of the untrue pleadings, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial."

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

GERALD A. SCHROEDER and
CLARA JOHNSON SCHROEDER,

Petitioners,

vs.

J. C. BUSENHART, et al.,

Respondents.

BRIEF OF SCHOOL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Scheffer Press, Inc.—ANdover 3-6850

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No. 947

GERALD A. SCHROEDER and
CLARA JOHNSON SCHROEDER,

Petitioners,

vs.

J. C. BUSENHART, et al.,

Respondents.

BRIEF OF SCHOOL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To: The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States.

Respondents, who are past and present members of the Trustees of Schools, the Board of Education and the school administration* in Mount Prospect, Illinois, submit this brief in opposition to the petition for certiorari.

QUESTIONS PRESENTED

1. Whether petitioners have preserved an alleged federal constitutional question for review when they failed to raise it until their petition for rehearing in the Illinois

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* Identified in detail on the signature page of this brief.

Appellate Court, even though they might reasonably have anticipated the ruling which they contend violates their constitutional right (that the condemnation judgment is *res judicata* of their contention that the taking was not for a public purpose) at least as early as the time respondent-defendants' motion for summary judgment was filed in the trial court.

2. Assuming petitioners could raise the question, despite their failure to raise it timely in the state courts, the following: The Illinois courts held barred by *res judicata* petitioners' claim that the purpose for which the school district took their land was to put them out of the fruit and vegetable business rather than for school use. This claim was held to have been determined by the prior judgment in the eminent domain proceeding in which the land was taken for a school site, because under settled Illinois law petitioners could have raised the question of the purpose of the taking in that proceeding but failed to do so. The question is whether this application of the rule of *res judicata* violated petitioners' rights under the due process clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

This case is one of six attempts petitioners have so far made to relitigate the right of the school district to take a certain parcel of land in Mount Prospect, Illinois, for use as a school site. The history of this litigation is reported in *Trustees of Schools* v. *Schroeder,* 23 Ill. 2d 74 (1961); *Trustees of Schools* v. *Schroeder,* 25 Ill. 2d 289 (1962); *People ex rel. White* v. *Busenhart,* 29 Ill. 2d 156 (1963) (deciding consolidated appeals in two cases); *Schroeder* v. *Illinois,* 354 F. 2d 561 (7th Cir. 1965), *cert. denied,* 384 U.S. 972 (1966); and in the opinion of the Appellate Court in this case, *Schroeder* v. *Busenhart,* 80

Ill. App. 2d 431 (1st Dist. 1967). The following is a summary of that history.

The Condemnation Trial and the First Appeal.

The condemnation action giving rise to these proceeding was commenced in the Circuit Court of Cook County, Illinois on November 6, 1959 against petitioners, Gerald A. Schroeder and Clara A. Schroeder, who then owned the land in question. After the Schroeders' amended traverse was denied, the case was tried, and a jury awarded them $267,083.33. The circuit court granted the school trustees' motion for new trial, from which order the Schroeders appealed to the Illinois Supreme Court. That court reversed in *Trustees of Schools* v. *Schroeder,* 23 Ill.2d 74 (1961) and directed entry of the judgment upon the verdict. (The court declined to review the validity of the taking until final judgment had been entered.)

Proceedings on Remand.

On remand, the circuit court entered judgment on the verdict, and the school trustees deposited the amount of the judgment, which with interests and costs totalled $280,956.10, with the county treasurer pursuant to Illinois statute (Ill. Rev. Stat., 1959, Ch. 47, §14). The circuit court thereupon entered an order finding fee-simple title in the school trustees and putting them in possession pursuant to provision therefor in the judgment order and as provided by Illinois law.

The Second Appeal.

The Schroeders again appealed, challenging the validity of the taking. The sole ground they urged was that their land could not be taken because an Illinois statute forbade the school district from taking land within forty

rods of the owner's dwelling. The Illinois Supreme Court held that the statute did not have that effect as to the land in question and affirmed in May, 1962. *Trustees of Schools* v. *Schroeder,* 25 Ill.2d 289 (1962).

After their counsel had filed a petition for rehearing in the Supreme Court, the Schroeders retained new counsel. These new counsel filed in the Illinois Supreme Court a motion for a stay and a motion for leave to file an additional petition for rehearing. The court denied these motions and, on September 27, 1962, denied rehearing.

Further Proceedings in the Trial Court.

While the petition for rehearing was pending, the Schroeders, through their new counsel, filed various motions and petitions in the trial court seeking to assert new grounds for challenging the validity of the taking. After the denial of rehearing by the Supreme Court, the trial court overruled these various petitions and motions. The trial court also granted the school authorities a supplemental writ of possession directing the re-eviction of the Schroeders (who had unlawfully reoccupied the property while the school was being constructed).

The "Taxpayers' Suit."

At about the same time, in September, 1962, the Schroeders, purporting to join with them certain other alleged taxpayers, filed a petition (under Ill. Rev. Stats., 1951, Ch. 113 § 44) for leave to file a taxpayers' suit for injunction, which also sought to challenge the validity of the taking. The circuit court denied leave to file the taxpayers' suit.

The Third and Fourth Appeals.

The Schroeders thereupon appealed to the Illinois Supreme Court from the judgment denying leave to file the taxpayers' suit and from the order overruling their various petitions and motions in the condemnation suit in which they had sought to raise new points challenging the validity of the taking. The Illinois Supreme Court consolidated these appeals (over the objection of the Schroeders) and in May, 1963, affirmed the circuit court. *People ex rel. White* v. *Busenhart,* 29 Ill.2d 156 (1963).

With reference to the Schroeders' petitions and motions in the condemnation case, the court held that all points therein raised were or could have been raised in the second appeal and therefore were conclusively adjudicated against the Schroeders by the decision on that appeal. (29 Ill.2d at 159.) Turning specifically to the free-simple-title argument which is asserted in the petition for certiorari at bar (p. 16), the court continued (29 Ill.2d at 159-60):

> "Despite the rule [barring the raising of any point that could have been raised on the prior appeal], the prayer of the petition for the taking of a fee-simple title, and the failure to even include the question in the traverse,* the Schroeders contend that it goes to the jurisdiction of the court and can be raised either directly or collaterally. In *Chicago Housing Authority* v. *Berkson,* 415 Ill. 159, the right of the condemnor to acquire property by eminent domain was questioned and alleged to be jurisdictional. It was there said, at pages 161 and 162: '* * * (T)he objection was waived by failure to raise it at the appropriate time. The objection goes only to the right of the condemnor to

* This refutes petitioners' false assertion (Petition, p. 4) that the fee-simple title question was raised in the traverse. The traverse and amendment thereto are not part of the record.

> acquire property by eminent domain. It does not effect the general jurisdiction of the court over the subject matter of an eminent domain action.' There, the condemnor's right to acquire by eminent domain was attacked, while here only the extent of the estate to be taken is alleged to be grounds for going behind the judgment. We are of the opinion that the fee-simple-title question is barred."

With reference to the taxpayers' injunction suit, the Illinois Supreme Court stated that the petitioners therein again sought to raise "the points urged in the eminent domain case." The court held that its judgment in the second appeal in that case was "not subject to collateral attack since the court had jurisdiction of the subject matter and the parties." (29 Ill.2d at 162.)

Petitioners filed a petition for rehearing which was denied. They did not file a petition for certiorari in this Court.

The Federal Action.

The Schroeders next filed an action in the United States District Court, in which they again sought to relitigate the question of whether the school district had the right to take the land for school purposes. They asked for a declaratory judgment that the state court judgments and orders in the condemnation case were void; that plaintiffs be declared to be the rightful owners of the condemned property; and that the State of Illinois, the Trustees of Schools, and the School District be enjoined "from exercising any ownership over the premises herein and before described, or interfering with the rights of the plaintiffs as the rightful owners of the premises." (A. 20-21 in Case No. 1248, October Term 1965, in this Court.)

The district court dismissed the action, and the Court of Appeals for the Seventh Circuit affirmed. Both courts held that the federal courts lack jurisdiction to review collaterally judgments of state courts having jurisdiction over the person and subject matter and that the questions sought to be raised had been conclusively adjudicated against petitioners in the condemnation proceeding. *Schroeder* v. *Illinois,* 354 F. 2d 561 (7th Cir. 1965). This Court denied certiorari. 384 U. S. 972 (1966).

The Case at Bar.

The complaint in the case at bar was filed shortly before the federal action just described. The fifty defendants include past and present members of the School Board, the School Trustees, and the school administration, the deputy sheriffs who carried out the eviction orders, contractors hired to build the school, and the utility company which shut off petitioners' electric power after the Court had ordered them evicted.

The complaint alleges that the fifty defendants conspired in December, 1961 (which is when petitioners were evicted pursuant to the Court order carrying out the condemnation judgment) to take possession of the subject property and thereby destroy the fruit, vegetable, and Christmas tree business petitioners conducted there; and that defendants did so because petitioners were selling their produce at lower prices than their competitors. (Abst. 16-17, 21.) No defendant is alleged to be a competitor of petitioners or engaged in the produce business. The overt acts alleged to have been committed by various individual defendants are alleged to have been in furtherance of and pursuant to the supposed conspiracy and "for the sole

purpose of" achieving the object of the conspiracy. (Abst. 16, 17, 19, 21, 22, 25.)

Near the end of their complaint, following the conspiracy allegations, petitioners ask "in the alternative that if this Court does not deem the various acts and omissions of these defendants to constitute a conspiracy" that judgment be awarded "against the individual persons who committed the various acts of wrong doing herein and before set forth." (Abst. 25.)

The Illinois trial court entered summary judgment in favor of defendants, without prejudice to petitioners' right to assert in separate suits against individual defendants any tort claims charged against any of them.

The Appellate Court of Illinois affirmed, holding that petitioners' claim that defendants took possession of their property not for a public purpose but for the purpose of destroying their fruit and vegetable business because they were underselling their competitiors could have been raised in the condemnation case and was therefore barred by the judgment in that case. The Appellate Court also held that "because the conspiracy count fails on the ground of *res judicata,* the individual torts pleaded against various defendants are without adequate relation to each other for the purpose of being joined in a single action." Since petitioners had not sought leave to amend their complaint to plead each individual tort in a separate count, as required by the Illinois Civil Practice Act, the trial court had properly dismissed without prejudice as to the several individual tort claims.

Defendants also filed in the trial court a motion to assess attorneys fees and costs against plaintiffs under Section 41 of the Illinois Civil Practice Act (Ill. Rev. Stat., 1963, Ch. 110, § 41), which provides for assessment of such

expenses incurred by reason of allegations in a pleading "made without reasonable cause and not in good faith, and found to be untrue." The trial court denied this motion, but upon defendants' cross appeal the Appellate Court sustained the motion and remanded the case to the trial court for hearing to determine the amount of the expenses allowable. No final judgment has been entered pursuant to this remanding order.*

Petitioners filed a petition for rehearing in the Illinois Appellate Court in which they raised for the first time, as they concede (Petition, p. 9), the claim that the application of the rule of *res judicata* to bar them from challenging the purpose of the taking in this proceeding denies them due process of law in violation of the Fourteenth Amendment. The petition for rehearing was denied without opinion.

Petitioners then filed a petition for leave to appeal to the Supreme Court of Illinois, which that court denied without opinion. This petition for certiorari followed.

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* In addition, the School Trustees and the School Board, in their corporate capacities, filed a petition for leave to intervene in this case for the purpose of seeking an injunction against further vexatious relitigation by petitioners. The trial court, in its order granting summary judgment to defendants, denied this petition without prejudice to the school authorities' right to seek such relief in an independent proceeding in equity. (Petitioners, p. 9, neglect to inform this Court that the denial was without prejudice.)

ARGUMENT

I.

The Alleged Federal Constitutional Question Was Not Timely Raised.

Petitioner admittedly failed, prior to filing their petition for rehearing in the Illinois Appellate Court, to raise the alleged federal constitutional question they seek to present here. (Petition, p. 9.) The rule, as this Court stated it in *Herndon* v. *Georgia*, 295 U.S. 441, 442 (1935), is as follows:

> "The long-established rule is that an attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

Accord, *Radio Station WOW* v. *Johnson*, 327 U.S. 120, 128 (1945); *Hanson* v. *Deuckla*, 357 U.S. 235, 243-44 (1958); *Bloeth* v. *New York*, 82 Sup. Ct. 661 (1962) (opinion by Mr. Justice Harlan denying stay). Stern and Gressman, Supreme Court Practice, p. 98 (3d ed. 1962).

Neither the Illinois Appellate Court nor the Illinois Supreme Court actually entertained the question and decided it. Illinois does not permit the raising of a question for the first time in a petition for rehearing. Illinois Supreme Court Rule 367 (Ill. Rev. Stat., 1967, Ch. 110A, § 367); *Sobina* v. *Busby*, 62 Ill. App. 2d 1, 25-26 (1st Dist. 1965). The Illinois Appellate Court therefore denied rehearing without opinion and the Illinois Supreme Court denied leave to appeal without opinion.

Moreover, under Illinois procedure, petitioners were required first to present their contention to the trial court

as a prerequisite to raising it at all on appeal. *Ray* v. *Chicago,* 19 Ill. 2d 593, 602 (1960). When such a requirement of state law is not complied with and the state reviewing court ignores or fails to notice the supposed federal question, this Court will refuse to review the question because it was not timely raised. *Bailey* v. *Anderson,* 327 U.S. 203, 206-207 (1945); *Chicago, Ind. & L. R. Co.* v. *McGuire,* 196 U.S. 128, 131 (1905); Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, pp. 118-119 (Wolfson and Kurland ed. 1951). A constitutional question which is not raised in the manner required by applicable state procedure will not be considered by this Court. *Beck* v. *Washington,* 369 U.S. 541, 549 *et seq.* (1962); Stern and Gressman, *op. cit., supra,* p. 95.

Stembridge v. *Georgia,* 343 U.S. 541 (1952) is squarely in point. There, as here, the question was raised for the first time by petition for rehearing in the state intermediate reviewing court, which, like the Illinois Appellate Court here, denied rehearing without opinion. There, as here, the state Supreme Court declined without opinion to review the case. This Court refused to review the case, pointing out that under Georgia law a constitutional question must first be raised in the trial court, and concluding (p. 547):

> "... the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment. [Citing cases.]" (Emphasis is the Court's.)

Petitioners cannot bring themselves within the rule of the "surprise" cases, an example of which is *Brinkerhoff-*

Faris Trust and Savings Co. v. *Hill,* 281 U.S. 673 (1930), cited in the petition (pp. 13, 15). In that case the federal constitutional question could not reasonably have been anticipated prior to the opinion of the state reviewing court, and it was therefore presented at the first opportunity when it was raised in the petition for rehearing. See Stern and Gressman, *op. cit., supra,* p. 99. To fall within the rule of such cases petitioner must demonstrate that "the question was first brought into the case by an unexpected decision of the highest state court, and that the litigant had no prior opportunity to assert the claimed federal right or immunity." Robertson and Kirkham, *op. cit., supra,* p. 130. These conditions are not met by petitioners here.

In the case at bar it was asserted in defendants' motion for summary judgment, filed in the trial court, that the court judicially knew, from its own records, that petitioners were ousted from the property pursuant to a condemnation judgment which was binding upon them, and it was therefore conclusively determined that they were not ousted for the purpose of destroying their fruit and vegetable business. (Abst. 50-55.) The Illinois Supreme Court holds that in a condemnation proceeding the owner is entitled to assert the defense that the taking is not for a public purpose. *Deerfield Park District* v. *Progress Development Corp.,* 22 Ill. 2d 132 (1961). Illinois also bars raising in a later action any ground that could have been presented in an earlier action in which there has been a final judgment. *People ex rel. White* v. *Busenhart,* 29 Ill. 2d 156 (1963). Petitioners knew when the motion for summary judgment was filed in the trial court, and they knew when the case was later briefed in the Illinois Appellate Court, that defendants were asserting that the condemnation judgment had conclu-

sively adjudicated the public purpose of the taking. Under Illinois law petitioners were obligated to raise in the trial court the contention that applying the rule of *res judicata* to them would violate their federal constitutional rights.

Even if the record did not show petitioners could reasonably have anticipated such a ruling as early as the trial court proceeding, they would have the burden of showing they could not reasonably have anticipated it prior to the Appellate Court's opinion. Petitioners have the burden of showing that the point was raised at the earliest time they could reasonably have anticipated a ruling that their claim was barred by the condemnation judgment. They have not, however, filed here the briefs in the Appellate Court (as they might have done, Stern and Gressman, *op. cit., supra,* p. 225) or otherwise made any attempt to discharge that burden. Their failure to do so raises the inference, which is in accordance with the fact, that the *res judicata* argument which the Appellate Court sustained was made in the briefs of defendants (respondents here) in that Court.

Petitioners' failure to raise the question until their petition for rehearing in the Illinois Appellate Court forecloses review by this Court.

II.

No Substantial Federal Question Is Presented.

Even if it had been properly raised and preserved, the question petitioners seek to present is not a substantial federal question.

The very existence of the question is predicated on the assumption that petitioners have never had an opportunity to be heard on their conspiracy charge. (Petition,

pp. 11, 12-13.) This assumption is false. It is based upon a disregard of the holding of *Deerfield Park District* v. *Progress Development Corp.*, 22 Ill. 2d 131 (1961), 174 N.E. 2d 850 (1961).

The gist of petitioners' conspiracy charge is that their land was taken for the purpose of destroying their fruit and vegetable business because they were underselling their competitors, and not for a public purpose. This contention could have been asserted in the condemnation case.

In the *Deerfield* case, *supra,* cited by the Appellate Court in this case (Petition, p. 7a), the Illinois Supreme Court held that although the motives that may have actuated the members of the condemning authority were not a proper subject of judicial inquiry in any proceeding, the question of whether the taking was for a public purpose could be raised and should be determined in the condemnation proceeding. And see *Duffy* v. *Frankenberg,* 144 Ill. App. 103 (1st Dist. 1908), also cited by the Appellate Court. (Petition, p. 7a.) That question, and all other questions that could have been raised in the condemnation case were conclusively adjudicated by the judgment in that case. *People ex rel. White* v. *Busenhart,* 29 Ill. 2d 156, 159 (1963).

Petitioners' misleading treatment of the *Deerfield* case ignores this holding and asserts that the case precluded them from making their no-public-purpose contention in the condemnation case because that case does not "permit examining the motives of officials in a condemnation action." (Petition, pp. 12-13.) The *Deerfield* case holds that the motives that may have actuated the members of the condemning body to cause them to vote in favor of the taking, could not be a proper subject of judicial in-

quiry in any proceeding. Whether the action of the condemning body is for a public purpose, which is the only inquiry in this area that can be made in the condemnation case or any other case, can and should be made, the *Deerfield* case holds, in the condemnation case. Petitioners could have, but did not, show in the condemnation case that the condemnation was brought to accomplish the alleged conspiracy and not for a public school purpose.

It is immaterial that, as petitioners argue (Petition, p. 12) the School Trustees acted as a body corporate in the condemnation case and are named here as individuals. Under Illinois law, as declared by the Appellate Court, the question of the public purpose of the taking cannot be collaterally challenged after the condemnation judgment is final and the school has been built on the land, by the expedient of suing the individual members of the school body. This Illinois rule is consistent with federal authorities on privity of parties as it pertain to *res judicata*. *E.g.*, *Zdanok* v. *Gliddon*, 327 F. 2d 944 (2d Cir. 1964); *Gart* v. *Cole*, 263 F. 2d 244 (2d Cir.), *cert. denied*, 359 U.S. 978, 79 Sup. Ct. 898, 3 L. Ed. 2d 929 (1959); *Bruszewski* v. *United States*, 181 F. 2d 419 (3d Cir.), *cert. denied*, 340 U.S. 865, 71 Sup. Ct. 87, 95 L. Ed. 632 (1950).

It is likewise immaterial to argue, as do petitioners (Petition, p. 12), that the condemnation suit was a proceeding to obtain title to land, while this is "an action for conspiracy to destroy the petitioners' business." Petitioners action here is predicated on a contention, *i.e.*, that the taking was for an unlawful, not a public, purpose, which was adjudicated against them by the condemnation judgment. Since this contention is the basis for their claim here, that claim is defeated by the condemnation

judgment, which, of necessity, excludes acquisition of the land for any purpose other than for a public school.

Petitioners' Claim That They Still Own the Land.

Petitioners' bad faith and the deliberately vexatious character of this action are illustrated by their claim that, despite some five prior judgments to the contrary, they are still the owners of the land. (Petition, pp. 16-18.) They ignore repeated holdings of the Illinois and federal courts that the Illinois condemnation court had jurisdiction over the parties and the subject matter and that its adjudication of fee-simple title in the School Trustees cannot be collaterally attacked. *People ex rel. White* v. *Busenhart,* 29 Ill. 2d 156, 159-60 (1963); *Schroeder* v. *Illinois* 354 F.2d 561, 563 (7th Cir. 1965); *Schroeder* v. *Busenhart,* 80 Ill. App. 2d 431 (1st Dist. 1967) (the decision below).

Petitioners' assertion that there has never been an adjudication that the condemnation court had jurisdiction is false. In its opinion on their third and fourth appeals, the Illinois Supreme Court (*People ex rel. White* v. *Busenhart,* 29 Ill. 2d 156, 159-60 (1963)) squarely held that the condemnation court had jurisdiction, and that therefore "the fee-simple-title question is barred." The Court of Appeals for the Seventh Circuit has also held that the Illinois condemnation court had jurisdiction over the parties and the subject matter and that therefore its judgment could not be collaterally attacked. *Schroeder* v. *Illinois,* 354 F. 2d 561, 563 (7th Cir. 1965), *cert. denied,* 384 U.S. 972 (1966).

Although the point is immaterial, petitioners are also wrong in their fundamental premise that under Illinois law a school district cannot acquire fee-simple title by eminent domain. (Petition, p. 16.) The federal case they cite for this proposition has been discredited by a later

Illinois decision, *City of Waukegan* v. *Stanczak*, 6 Ill. 2d 594 (1955), and by the 1959 Illinois School Code (Ill. Rev. Stat., 1959, Ch. 122, §§ 7-17, 4-21, 4-22, 4-23, 4-28). This point of Illinois law is discussed in more detail in our brief in opposition to petitioners' earlier petition for certiorari, October Term 1965, No. 1248, pp. 17-19.

The Assessment of Expenses for Pleading in Bad Faith.

The Appellate Court found, on the basis of the repeated prior judgments against them in cases in which they had made the same contention, that petitioners' allegations that they owned the land in spite of the condemnation judgment giving ownership to the School Trustees were made in bad faith and without probable cause. The correctness of this holding, based upon judicial proceedings of which the court took judicial notice, cannot seriously be questioned. The assessment of expenses caused by these false allegations is authorized by Section 41 of the Illinois Civil Practice Act (Ill. Rev. Stat., 1965, Ch. 110, § 41). Granted the allegations made in bad faith, the imposition of such a sanction does not raise a federal question, and petitioners do not contend that it does. Similar sanctions are imposed by the federal courts. 6 Moore, *Federal Practice*, ¶ 54.77[2], at 1352 (2d ed. 1966). *Accord, Bell* v. *School Board*, 321 F. 2d 494, 500 (4th Cir. 1963); *Rolax* v. *Atlantic Coast Line R.R.*, 186 F. 2d 473, 481 (4th Cir. 1951); *Taussig* v. *Wellington Fund, Inc.*, 187 F. Supp. 179, 222-23 (D. Del. 1960), *affirmed*, 313 F. 2d 472 (3rd Cir. 1963), *cert. denied*, 374 U.S. 806 (1963).

CONCLUSION

The petition for certiorari, which is but the latest episode in petitioners' campaign of unceasing relitigation against the school district, is frivolous and should be denied.

Respectfully submitted,

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